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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996:	)	CC Docket No. 96-152
Telemessaging, Electronic	)	
Publishing, and Alarm	)	
Monitoring Service	)	
	)	
To: The Commission	)	

REPLY COMMENTS OF THE ALARM INDUSTRY COMMUNICATIONS COMMITTEE

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SUMMARY

The comments filed in this docket reveal a substantial amount of support for the positions set forth by AICC in its initial comments. Some parties, however, seek to use this proceeding as a forum for rewriting the provisions of Section 275 and negating the will of Congress. AICC urges the Commission to reject these attempts to nullify Section 275.

Mindful of the alarm monitoring industry's dependence on BOC bottleneck services and of the BOCs' incentives and opportunities for anticompetitive and discriminatory conduct, in Section 275(a)(1) Congress banned the BOCs from "engag[ing] in the provision of alarm monitoring services" for five years. Out of fairness to Ameritech, which had previously entered the alarm monitoring business, Congress included Section 275(a)(2) to exempt it from this moratorium. Congress, however, limited this exception by forbidding grandfathered entities from growth by acquisition.

Despite the seemingly straightforward nature of the statutory scheme, the BOCs already have commenced a barrage of initiatives aimed at interpreting Section 275 out of existence. To ensure that these attempts do not succeed in undermining the will of Congress, the Commission should clearly announce the following guiding principles to implement Section 275:

- To deter BOC attempts to engage in the provision of alarm monitoring service under cover of resale, agency or marketing agreements, the Commission should establish bright line rules to determine when a BOC is in violation of the prohibition contained in Section 275(a)(1). Any involvement in the offering of alarm monitoring services to the public, other than as a vendor of

transmission or other services to alarm companies, should be found to be the "provision of" alarm monitoring service. Without such bright line rules, SWBT's CEI Plan for Security Service is sure to be only the first of numerous BOC attempts to eviscerate the statute in this way, miring the FCC in an endless regulatory morass.

- To prevent the one BOC that actually is grandfathered from abusing that status, the Commission should clarify that the prohibition on Ameritech's obtaining "financial control" of an unaffiliated alarm monitoring entity includes asset purchases. Any other conclusion renders the restrictions on Ameritech's grandfathering meaningless.

- To prevent the limited grandfathering clause from being expanded to cover all the BOCs, the Commission should recognize that underlying transmission services supplied by BOCs to alarm monitoring companies do not meet the definition of alarm monitoring service provided by Congress in Section 275 and, thus, are unaffected by that section.

- To prevent enforcement of Section 275 from being made impossible, the Commission should declare that its grant of authority extends to all alarm monitoring services regardless of whether they involve interstate, intrastate, interLATA or intraLATA transmission.

Finally, the Commission also should adopt enforcement policies that will deter future attempts to evade the strictures of Section 275. By shifting the burden of proof to the party in possession of the material documentation, the Commission can ensure that it meets its statutory obligation to resolve complaints in 120 days and that the broader pro-competitive goals of the 1996 Act are served.

TABLE OF CONTENTS

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In the Matter of	)	
	)	
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The Alarm Industry Communications Committee ("AICC"), by its attorneys, respectfully submits these reply comments in response to the Commission's *Notice of Proposed Rulemaking* ("*NPRM*") in the above-captioned proceeding.[1] As with its initial comments, AICC's reply comments are limited in scope to those sections of the *NPRM* that address alarm monitoring service, including portions thereof that address the Commission's authority under and enforcement of Section 275. Review of the parties' initial comments in this docket indicate that there is widespread support for the positions articulated by AICC in

[1] *Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring*, CC Docket No. 96-152, *Notice of Proposed Rulemaking*, FCC 96-310 (rel. Jul. 18, 1996)("*NPRM*").

its initial comments. However, not surprisingly, some parties have treated this rulemaking as yet another opportunity to rewrite the provisions of Section 275 in a way that nullifies Congress' intent. AICC continues to urge the Commission to resist these attempts to repeal Section 275.

I. Introduction

In its initial comments, AICC demonstrated that, under Section 275, the Commission has jurisdiction over alarm monitoring service without limitation by state or LATA boundaries. AICC also proved that: (1) U S West is not grandfathered under Section 275(a)(2); (2) Ameritech may not acquire the assets of unaffiliated alarm monitoring entities; and (3) Southwestern Bell Telephone ("SWBT") may not engage in the provision of alarm monitoring service under cover of agency and marketing agreements. Additionally, AICC demonstrated that the Commission's enforcement policies must shift the burden of proof to the defendant once a *prima facie* case has been made. In these reply comments, AICC underscores those points and addresses various attempts by parties to rewrite or nullify Section 275.

II. Alarm Monitoring Service

A. Scope of the Commission's Authority (¶¶ 26-27, 73)

As recognized by Ameritech and AT&T, Congress intended for the Commission's authority under Section 275 to extend to "*all* 'alarm monitoring services'".[2] Congress defined alarm monitoring without reference to geographic boundaries.[3] Thus, consistent with the "national policy framework" contemplated by Congress with its enactment of the 1996 Act, the Commission's jurisdiction encompasses all alarm monitoring services regardless of whether they involve interstate, intrastate, interLATA or intraLATA transmission.

Of all the commenting parties, only the California PUC and the New York DPS assert that the Commission's jurisdiction is limited to interstate alarm monitoring services.[4]

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[2] *Comments of Ameritech*, CC Docket No. 96-152, at 30-31 (emphasis added)(filed Sept. 5, 1996)("*Ameritech Comments*"). *See also Comments of AT&T Corp.*, CC Docket No. 96-152, at 22 (filed Sept. 4, 1996)("*AT&T Comments*").

[3] 47 U.S.C. § 275(c); *Comments of the Alarm Industry Communications Committee*, CC Docket No. 96-152, at 3-4 (filed Sept. 4, 1996)("*AICC Comments*"); *Ameritech Comments* at 31.

[4] *Comments of the People of the State of California and the Public Utilities Commission of California*, CC Docket No. 96-152, at 9 (filed Sept. 4, 1996); *Letter from Maureen O. Helmer, General Counsel, New York Department of Public Service, to William F. Caton, Acting Secretary, FCC*, CC Docket No. 96-152, at 2 (filed Sept. 4, 1996). In deference to the state PUCs, AICC notes that although alarm monitoring service is not inherently interstate or intrastate in nature (accordingly, it was defined by Congress without reference to geographic boundaries), nothing in Section 275 supplants the PUCs' jurisdiction over intrastate transmission services used by alarm monitoring companies as a component of their alarm monitoring service.

The flaw in the PUCs' view is that if the Commission's jurisdiction was limited to interstate alarm monitoring services, Section 275 would have to be interpreted to apply to only interstate alarm monitoring service. If that were the case, BOCs simply will locate alarm monitoring central stations and direct traffic in ways that avoid crossing state boundaries and, thereby, avoid the strictures of Section 275. In short, interpreting the scope of Section 275, and the Commission's authority under it, to be limited to interstate alarm monitoring services reduces that section to nothing more than an invitation to BOCs seeking to enter the alarm monitoring business to construct central station facilities in every state in which they intend to do business. This would eviscerate Section 275 entirely and is clearly not consistent with Congress' intent.

B. The Provision of Underlying Transport Services, No Matter How Technologically Sophisticated, Does Not Fall Within the Definition of Alarm Monitoring Service (¶¶ 69-70)

The definition of "alarm monitoring service" clearly includes the provision of monitoring equipment at the customer's premises for the detection of a possible threat at such premises to life, safety or property.[5] Basic or enhanced transmission services provided to alarm monitoring companies (as opposed to end users) for use as a component of their alarm monitoring service do not fall within the definition of alarm monitoring services, and thus, are unaffected by Section 275(a). While U S West, BellSouth, Bell Atlantic and others who

[5] 47 U.S.C. § 275(e).

provide such transmission services to alarm monitoring companies may continue to do so, that does not mean that they qualify for "grandfathering" under Section 275(a)(2).[6] Ameritech is the only BOC that was engaged in alarm monitoring services prior to November 30, 1995, and thus, is the only BOC that qualifies for grandfathering under Section 275(a)(2).

Aside from U S West, all commenters addressing the issue agree that the provision of underlying transmission services that may be used by alarm monitoring companies as a component of alarm monitoring services does not itself constitute the provision of alarm monitoring services.[7] Perhaps out of a confused notion that Section 275(a)(1) might somehow prohibit it from providing transmission services like Versanet and Scan Alert to alarm monitoring companies, U S West asserts that these services are grandfathered under Section 275(a)(2).[8] These services, regardless of whether they are basic or enhanced, are nothing more than transmission services which do not satisfy the definition of alarm monitoring service set forth by Congress in Section 275(e). Many, if not all of the BOCs,

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[6] *See, Comments of Bell Atlantic*, CC Docket No. 96-152, at 13 and n.53 (filed Sept. 4, 1996)("*Bell Atlantic Comments*").

[7] *AICC Comments* at 11-16; *Ameritech Comments* at 25-27; *Bell Atlantic Comments* at 13; *BellSouth Comments*, CC Docket No. 96-152, at 22 (filed Sept. 4, 1996); *Nynex Comments*, CC Docket No. 96-152, at 25 (filed Sept. 4, 1996); and *Comments of SBC Communications Inc.*, CC Docket No. 96-152, at 18 (filed Sept. 4, 1996)("*SBC Comments*").

[8] *Comments of U S West, Inc.*, CC Docket No. 96-152, at 25-31 (filed Sept. 4, 1996)("*U S West Comments*").

provide services similar to U S West's Scan Alert and Versanet services—surely Congress did not intend to nullify Section 275(a)(1) by grandfathering all the BOCs under Section 275(a)(2).

Thus, although U S West may not have intended to propose such an absurd interpretation of the statute, its position leads to no other conclusion. To be sure, U S West may continue to provide basic and enhanced transmission services to alarm monitoring companies—these services do not constitute the provision of alarm monitoring service as defined in Section 275(e) and, thus, are unaffected by the restriction set forth in Section 275(a)(1).

BellSouth also appears to suffer from a similarly confused understanding of Section 275. Although "BellSouth concurs in the Commission's initial assessment that the provision of underlying telecommunications services that may be used to provide alarm monitoring services does not itself constitute provision of alarm monitoring services", it avers that it provides a spread spectrum transmission service that qualifies for grandfathering under Section 275(a)(2).[9] Like U S West's Versanet, this too is merely a transmission service provided to alarm companies that does not meet the definition of an alarm monitoring service under Section 275(e) and, thus, is unaffected by the restriction set forth in Section 275(a)(1).

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[9] *BellSouth Comments* at 23.

C. Ameritech May Not Lawfully Acquire the Assets of nor Exchange Equity Interests with Unaffiliated Alarm Monitoring Entities (¶ 72)

Section 275(a)(2) exempts from the 5-year prohibition of Section 275(a)(1) any BOC providing alarm services as of November 30, 1995. Most parties do not challenge the widely held understanding that this grandfathering provision includes only Ameritech. Section 275(a)(2) limits its exception, however, by forbidding Ameritech from growth by acquisition. It does so by banning Ameritech from obtaining any "equity interest" in or "financial control" of any unaffiliated alarm company during the five-year moratorium. There can be no greater indication of "financial control" than ownership of the assets of an alarm monitoring company. Thus, even though Section 275(a)(2) allows it to retain and grow its existing business during the five-year prohibition, Ameritech may not acquire the assets of unaffiliated alarm monitoring entities (such as Circuit City) without violating the statute.

Although Ameritech prudently did not use its initial comments to belabor its flawed position that Section 275 merely dictates the form in which its acquisition of unaffiliated alarm monitoring entities must take place (and, thus, permits it to acquire the assets of any and all unaffiliated alarm monitoring entities),[10] it did restate its attempt to rewrite the section so that the exception allowed for the exchange of customer accounts encompasses an

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[10] *See Comments of Ameritech Corporation on AICC's Motion for Orders to Show Cause and to Cease and Desist*, CCBPol 96-17, at 4 (filed Sept. 6, 1996)("*Ameritech Comments on AICC's Motion*").

exchange of equity interests created to aid Ameritech in tax avoidance.[11] As AICC explained in its reply comments in CCBPol 96-17, Ameritech's contention that the exchange exception was meant to enable it to structure swaps of customer accounts as equity transactions instead of pure asset exchanges is flatly inconsistent with the language of Section 275(a)(2).[12] The language of that section allows the exchange of *customer accounts*, not the exchange of stock companies holding customer accounts. Thus, Ameritech's suggestion that Congress' intent was to assist it in tax avoidance is simply nonsense.

D. Bright Line Rules Are Necessary to Determine When A BOC is "Engag[ing] in the Provision of Alarm Monitoring Services" in Violation of the Prohibition Contained in Section 275(a)(1) (¶ 71)

SWBT already has tendered the first of what, barring definitive Commission action in this rulemaking, is sure to be many requests for the Commission to allow BOCs to provide alarm monitoring service under the guise of resale, agency or marketing agreements.[13] SWBT's request, and others that may follow, are nothing more than thinly veiled attempts to do indirectly what Congress forbade them to do directly (engage in the provision of alarm

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[11] *Ameritech Comments* at 29-30; *See also Ameritech Comments on AICC's Motion* at 8-9.

[12] *Reply Comments of the Alarm Industry Communications Committee*, CCBPol 96-17, at 6 (filed Sept. 13, 1996). AICC incorporates herein its reply comments and initial motion in CCBPol 96-17. *Id.*; *AICC's Motion for Orders to Show Cause and to Cease and Desist*, CCBPol 96-17 (filed Aug. 12, 1996).

[13] *Southwestern Bell Tel. Co. Comparably Efficient Interconnection Plan for Security Service*, CC Docket Nos. 88-229, 90-623 and 95-20 (filed Apr. 4, 1996)("*SWBT CEI Plan*").

monitoring service). Unless it is prepared to expend a tremendous amount of its valuable resources reviewing various BOC attempts to undermine the congressional intent underlying Section 275 (U S West, Ameritech and SWBT, in a period of less than six months after passage of the Act, already have provided sufficient evidence of the BOCs' willingness and intention to do this), the Commission must adopt bright line rules that establish that "engag[ing] in the provision of alarm monitoring services" includes resale, sales or marketing of alarm monitoring services, or any form of revenue sharing with an alarm monitoring provider, either individually or collectively. In short, if there is any economic incentive for a BOC to favor one alarm monitoring service provider over another, the Commission should construe the activity to be engaging in the provision of alarm monitoring services. Any time a BOC is dealing directly with the public in connection with alarm monitoring services, there should be a presumption that the BOC is engaged in the "provision of" alarm monitoring service.

As noted above, SWBT already has submitted for Commission approval a plan to allow it to engage in the provision of alarm monitoring service under the guise of an agency/marketing agreement that amounts to nothing short of alarm monitoring resale.[14] However, SWBT maintains, in its joint comments with its parent, SBC, that Section 275 is intended only to preclude it from operating an alarm monitoring center, not from

[14] *SWBT CEI Plan*, CC Docket Nos. 88-229, 90-623 and 95-20 (filed Apr. 4, 1996).

participating in the alarm monitoring business.[15] If the "provision of" language in the Section 275 moratorium is read to preclude only actual operation of an alarm monitoring center, and otherwise to allow participation as proposed by SWBT, Section 275(a)(1) will be rendered meaningless.

On this point, Congress' intent was clear: Section 275 was intended to eliminate opportunities and incentives for BOCs to discriminate against alarm monitoring companies held captive to them by their monopoly control over bottleneck services. Resale of alarm monitoring services certainly constitutes "engag[ing] in the provision of alarm monitoring service" and, thus, is prohibited by Section 275(a)(1). The only other parties commenting on the resale issue, Ameritech and Bell Atlantic, agree.[16]

Although several BOCs aver that sales agency and marketing agreements between them and "unaffiliated" alarm monitoring entities do not violate the prohibition contained in Section 275(a)(1),[17] allowing BOCs to enter into such agreements would effectively nullify the statute. If the Commission were to interpret the statute so as to permit such agency and marketing arrangements, it would give BOCs all of the incentives that Congress sought to eliminate through the enactment of Section 275. In short, if a BOC has an interest in seeing

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[15] *SBC Comments* at 18-20.

[16] *Ameritech Comments* at 27; *Bell Atlantic Comments* at 13.

[17] *See, e.g., Ameritech Comments* at 27-28.

a particular alarm monitoring company succeed, it will have an irresistible temptation to discriminate in favor of that particular provider.

Moreover, as SWBT has demonstrated in various filings in its CEI plan docket, the BOCs are likely to exploit such arrangements so that customers have neither a choice nor idea of what entity is providing the central station function.[18] To avoid a potentially endless drain on its own resources, the Commission must foreclose BOC gamesmanship by adopting bright line rules that set forth that "engag[ing] in the provision of alarm monitoring services" includes resale, sales or marketing of alarm monitoring services, or any form of revenue sharing with an alarm monitoring service provider. Without such bright line rules, the Commission is sure to be buried by a barrage of BOC attempts to provide alarm monitoring service under cover of agency and marketing agreements, resulting in the need for creation of a whole set of new rules and precedents addressing the permissible terms of agency agreements, the limits on revenue sharing and so on.[19] This new body of regulation clearly

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[18] *Letter from Todd F. Silbergeld, Director-Federal Regulatory, SBC Communications, Inc., to William F. Caton, Acting Secretary, F.C.C.,* CC Docket Nos. 85-229, 90-623 and 95-20 (filed July 3, 1996).

[19] The many *ex parte* filings submitted and meetings held by SWBT in its effort to justify its proposal prove this point. SWBT already has offered several minor modifications to its original plan in an effort to persuade the Commission staff that it is acceptable. Without bright line rules which are easily understood and enforced, the Commission can expect all six BOCs to demand the same repetitive process in their effort to push the outer edges of permissibility and chisel away at Section 275. The Act is clear and this process should be ended by a definite ruling.

is not what Congress intended. In response to the BOCs' entreaties to undo the five year prohibition, the Commission should just say no.

E. The Commission's Enforcement Policies Should Deter Attempts to Undermine Section 275 (¶¶ 81-84)

The Commission also should adopt enforcement policies which will deter future attempts to evade the strictures of Section 275. Primary among those policies is that once a *prima facie* case is made (a case which, if true, states a claim), the burden of proof shifts to the defendant, and no presumption of reasonableness attaches to the defendant's actions. Since a defendant LEC alone will possess the documentation concerning transactions between it and its alarm monitoring affiliate and between it and unaffiliated alarm monitoring service entities that otherwise may not come forth under the Commission's limited discovery rules and procedures, this burden shifting is appropriate and necessary to meet Congress' mandate that all complaints be resolved within 120 days.[20] Moreover, because the effects of discrimination are prospective and virtually impossible to quantify, "material financial harm" must include quantifiable as well as unquantifiable harm, and thus, should include, *per se*, any unreasonable discrimination or denial of service.

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[20] 47 U.S.C. § 275(c). AT&T and MCI agree. *See AT&T Comments* at 24; *Comments of MCI Telecommunications Corporation*, CC Docket No. 96-152, at 8-10 (filed Sept. 4, 1996).

Not surprisingly, many of the BOCs that filed comments disagree with these proposals.[21] Rather than advocate procedures that would further the pro-competitive goals of the 1996 Act, many BOCs offered proposals aimed at facilitating a hide-the-ball approach. Mindful that they alone will be in possession of most material documentation concerning transactions that are alleged to constitute discrimination, SBC argues that to establish a *prima facie* case much more is required.[22] While it is obvious that the establishment of such a hurdle would benefit SBC as a defendant, it is difficult to conceive how such a standard would further the pro-competitive goals of the Act.

Similarly, some BOCs contend that shifting the burden of proof is neither necessary nor lawful.[23] Here too, it is easy to see how this would aid a defendant BOC in an effort to conceal evidence of discrimination. It is *not* easy to see how this would help the Commission to resolve complaints in an expedited timeframe of 120 days.[24] Moreover, the argument proffered by both Ameritech and BellSouth that Section 556(d) of the Administrative Procedure Act ("APA") makes such a shift unlawful fails to recognize that Section 556(d) applies to "hearings required by Section 553 or 554" of the APA.[25] Section

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[21] *See, e.g., Ameritech Comments* at 33-34.

[22] *SBC Comments* at 23-24.

[23] *See Ameritech Comments* at 33-34; *BellSouth Comments* at 27-28.

[24] 47 U.S.C. § 275(c).

[25] 5 U.S.C. § 556(a).

554 governs "adjudications" and applies only to cases "required by statute to be determined in the record after opportunity for an agency hearing".[26] No such requirement can be found in Section 275. This conclusion would be no different if Commission actions under Section 275 are deemed "rulemakings" rather than "adjudications". Section 553 of the APA governs rulemakings and states that its provisions (which do *not* assign the burden of proof) apply instead of those of Section 556 unless "rules are required by statute to be made on the record after opportunity for an agency hearing."[27] Again, there is no such requirement in Section 275. Thus, Section 556 of the APA is irrelevant to complaint proceedings to be conducted under Section 275.[28]

Finally, SBC argues that material financial harm must be quantifiable.[29] However, SBC ignores the fact that discrimination is prospective in effect and is thus virtually unquantifiable. Moreover SBC fails to explain how the creation of a standard that is impossible to meet will realize Congress' intent to ensure that discrimination would not be permitted.

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[26] *Id.* § 554(a).

[27] *Id.* § 553(c).

[28] Even if the Commission was to disagree with AICC's position and find Section 556 of the APA applicable, the Commission may still shift the burden of proof. 5 U.S.C. § 556. Section 275(c) states that the "Commission must establish procedures . . ." and, thus, the Commission has the statutory authority required by Section 556(d) to shift the burden of proof as it deems necessary. 47 U.S.C. § 275(c); 5 U.S.C. § 556(d).

[29] *SBC Comments* at 25-26.

CONCLUSION

For all the foregoing reasons, the Commission should adopt the rules and policies proposed in the *NPRM*, as modified by AICC in its initial comments and in the preceding discussion.

Respectfully submitted,

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